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ABSTRACT

Federal regulations to prevent deceptive advertising seek to balance the advertiser's freedom of speech with protection of the consumer. This paper discusses what the Federal Trade Commission (FTC) has done to regulate advertising and evaluates the adequacy of its controls. The commission uses cease-and-desist orders, affirmative disclosure, corrective advertising, and advertisement substantiation requirements as its advertising controls; a review of court cases involving the FTC and advertisers shows that the FTC has broad latitude in determining what advertising is deceptive, and the courts usually have upheld the commission's decisions. This special relationship between the FTC and the courts is emphasized by the facts that the Federal Communications Commission refers to the FTC most of the questionable broadcast advertising it finds and that the National Association of Broadcasters has developed self-regulatory advertising codes for radio and television. The paper notes that no definitive steps have been taken against "psychological" advertising but concludes that, in view of the work being done at the national/federal level, little more can reasonably be expected for further control of false and deceptive advertising. (RL)

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DECEPTIVE BUSINESS PRACTICES:

FEDERAL REGULATIONS

by

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

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Introduction

The art of advertising arises from production and distribution. Thus, to the extent that the free enterprise system is a justified means to a better standard of living, advertising serves as an equally honorable end in the search for a better world in which to live.

As was stated in the landmark decision of Bates and Van O'Steen v. State Bar of Arizona, ___US___(1977): "(T)he consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. See Bigelow v. Virginia, supra. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. See FTC v. Procter & Gamble Co., 386 US 568, 603-604 (1967). In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking. 425 US at 761-765."

An effort upon which tens of billions of dollars are spent annually deserves some attention in terms of the methods which are employed in its advancement. Such methods may involve both acceptable and unacceptable, legal and illegal means. The purpose of this chapter is to demonstrate additional areas in which various advertising techniques have become subject to criticism, and to consider whether present controls upon such techniques are adequate.

It goes without saying that false advertising or untrue claims in behalf of a service or product are illegal, and the Federal Trade Commission has done much to curtail such abuses, as will be shown under the description of deceptive advertising practices.

A second form of advertising which has raised some concern involves omissions--presenting half the truth, partial truth or incomplete information. The high court responded to this complaint again in the case of Bates and Van O'Steen v. State Bar of Arizona: "But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative--the prohibition of advertising--serves only to restrict the information that flows to consumers," supra.

The third area of concern is that of misleading or deceptive advertising. The Supreme Court responded to this issue in the following words: "Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We forsee no

obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 US 748 (1976).

Furthermore, the Supreme Court has ruled that a practice which was unfair only to consumers was an illegal act under Section 5 of the Federal Communications Act. FTC v. Sperry and Hutchinson and Co., 405 US 233 (1972); Wisc. LR 1071-1072 (1972). While the FTC lost this case on a technicality, the court ruling clarified and reiterated the authority of the FTC to regulate false and deceptive advertising practices.

Previously, "the business community was still arguing that 'unfair' acts were limited to acts which were unfair to competitors and that there could be no such thing as an unfair act which was unfair only to consumers."[1]

The Federal Trade Commission

The FTC was established by Congress in 1914 under the Federal Trade Commission Act. Section 5 of the act held that: "Unfair methods of competition in commerce are hereby declared unlawful; the Commission is hereby empowered and directed to prevent persons, partnerships or corporations from using unfair methods of competition in commerce."[2]

The first case in which the FTC's right to regulate this particular business practice was sustained in FTC v. Winsted Hosiery Co. in 1922. It was held that false advertising was an unfair method of competition. The reasoning behind this is obvious. What was surprising was that competitors did not need to show actual business losses in order to collect damages. Deception of the public was simply not an issue at the time, and was dismissed further in FTC v. Raladam, 283 US 643 (1931). Here the court held that the only valid ground for advertising regulation was adversely-affected competition.

However, the Wheeler-Lea Amendments of 1938 added the phrase "deceptive acts or practices" to section 15 USC 45 (FTC Act) and established the protection of consumers from unfair advertising. Special emphasis was also placed on food, drug, cosmetic and device advertisements as they were "misleading in a material respect".

Jurisdiction of the FTC was expanded to contemporary limits in the case of Mueller v. US, 262 F2d 443 (CA5 1958). Here the district court decided that interstate sales need not be a prerequisite to FTC action so long as there were interstate advertisements.

The courts have given unusually broad latitude to the FTC to determine which advertisements are deceptive and which are in the public interest. They normally go along with the FTC's decision unless there is some "abuse of discretion". Indeed, the FTC's broad powers

of interpretation of advertisements caused one industry representative to remark that "an ad means what the FTC determines it to mean".[3] The FTC has, however, developed guidelines to determine if an advertisement is deceptive.[4]

First, misrepresentation of fact in an advertisement is considered deceptive. Thus, in the case where Rapid Shave claimed to soften sandpaper, it was found that the substance was, in fact, a mixture of plexiglass and sand. Rapid Shave could be shown to shave sandpaper, but only after a soaking period of 80 minutes, FTC v. Colgate-Palmolive Co., 380 US 374 (1965).

Secondly, if an advertisement is susceptible to being read in a way which distorts the function of the product, it may be controlled. For example, in the case of Savitch v. FTC a product for the treatment of delayed menstruation which used the headlines "at last--IT CAN BE SOLD!" and "don't risk disaster" was found to be deceptive in that it deceives women into purchasing what they thought was an abortifacient, 218 F2d 817 (CA2 1955).

Much later the FTC ordered the Hudson Pharmaceutical Corporation to stop advertising its Spider-Man brand vitamins in comic books or on television programs aimed at children.

The FTC said that "such use of Spider-Man can lead significant numbers of children to believe that the endorsed product has qualities and characteristics it doesn't have...and induce children to take excessive amounts of vitamins which can be dangerous to their health."

The Federal agency also said that the pharmaceutical company "agreed to the order without admitting or denying the charges." The company had introduced the product a year earlier.[5]

Finally, if valid statistical evidence is presented out of context, the advertisement is considered unacceptable. Thus, an Old Gold cigarettes advertisement which quoted the results of a study in which they had the lowest tar and nicotine levels, without pointing out that the variations among brands were so small as to be insignificant, was found to be deceptive, P. Lorillard Co. v. FTC, 186 F2d 52 (CA4 1956).

Thus, the FTC has primary jurisdiction for the actual determination of unfair or deceptive advertising in all media, and for the regulation of such advertising.[6]

Methods of Regulation

The FTC has several remedies available in actions against advertisers. The first is the traditional cease and desist order. This is the typical method of enforcement, but has its obvious drawbacks. It amounts simply to an admonishment to "go forth and sin no more".[7] But it has little punitive or deterrent effect except as an alert that if such practices are continued, at least one of the following consequences may occur:

(1) The FTC also relies on a mechanism known as affirmative disclosure. Rather than enforcing against those who misrepresent their product through its positive depiction in the advertisement, the Commission attempts to force producers to include any or all information which would induce a consumer not to buy the product. Thus, Geritol was forced in its advertisements to admit that it could do nothing in cases of pernicious anemia and that few of the persons who had anemia

had that type, JB Williams Co. v. FTC, 381 F2d 884 (CA6 1967).

Similarly, the court found in Heller and Son, Inc. v. FTC that: "We commence our study of the instant case with the knowledge that the Commission may require affirmative disclosures where necessary to prevent deception, and that failure to disclose by mark or label material facts concerning merchandise, which, if known to prospective purchasers, would influence their decisions of whether or not to purchase, is an unfair trade practice," 191 F2d 954 (CA7 1951).

(2) A more recent and much criticized method of relief is that of corrective advertising. This is based on the sleeper theory and others which contend that the advertisement continues to do its work after it is seen. Corrective advertisements help to prevent the influencing of consumer purchasing once the deceptive material is blocked from the media. Their function is two-fold: (1) They help consumers "re-think" their attitudes towards the product or brand in question and (2) they attempt to make up for losses to competitors who were the victims of the misconceptions.[8]

The usual procedure is to force the industry to devote 25% of his advertising budget for one year to advertisements which bring to light the contested facts. These are usually written by or based upon drafts by the FTC. One example of this is action taken by the Commission against Bufferin--on the ground that it does not "work twice as fast as aspirin". The sample drawn up by the FTC to replace such advertisements reads as follows:

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> In the case of the product Bufferin it has not been established that Bufferin relieves pain faster than aspirin; it has not been established that Bufferin will cause gastric discomfort less frequently than aspirin, and that Bufferin will relieve nervous tension, irritability or enable persons to cope with ordinary stresses to everyday life.[9]

Several other companies promoting pain relievers and analgesics were also found guilty of misrepresentation. Examples of claims cited were:

> Excedrin--"relieves tension and anxiety"
> Bayer--"more effective for the relief of minor pain than aspirin"
> Anacin--"more effective for pain relief than aspirin"

All were required to spend 25% of their advertisement budgets for two years to correct consumer misconception. However, the FTC has modified its corrective advertisement policy in one respect. Should the company be able to present evidence that the advertisements have achieved their goal before the two-year period ends, they may resume normal advertising.[10]

Profile Bread has also been required to declare that their product (which simply reduces the width of a slice of bread) is not an effective means of weight reduction, ITT Continental Baking Company, 36 Fed. Reg. 18, 522 (1971). A similar requirement has been placed upon the Coca-Cola Co. to demonstrate that their Hi-C fruit drinks are indeed not fruit juices, thereby repudiating the previously false nutritional claims connoted with that term, Coca-Cola Co., Inc. et. al., 3 CCH Trade Reg. Rep. 19, 351 (1970).

More recently it was determined that neither legislative revision of the Federal Trade Commission Act nor the First Amendment affects the power of the FTC in cease and desist proceedings. For example, in the case of Warner-Lambert Co. v. FTC, the agency ordered the manufacturer of Listerine mouthwash to insert corrective statements in future advertisements to remedy mistaken consumer belief resulting from past advertisements, ___US App. DC___, ___F2d___ (CADC, 1977).

The Commission's order, in the first corrective advertising case to face court review, requires Warner-Lambert to run language in $10 million worth of advertisements stating that: "Listerine will not help prevent colds or sore throat or lessen their severity," supra. The court eliminated the FTC's lead-in phrase, "Contrary to previous advertising", supra.

The fact that this decision followed the Bates and Van O'Steen ruling was insufficient to give Warner-Lambert First Amendment protection because the court held that deceptive advertising was involved. Consequently this corrective disclosure is to be made until the manufacturer spends an amount equaling the average annual Listerine advertisement budget during the period from April 1962 to March 1972--approximately $10 million according to FTC estimates, supra.

(3) The final alternative to the cease and desist order is the advertisement substantiation program. Established by the FTC regulation in 1971, it requires:

> All advertisers to submit, on demand, documentation, to support their claims regarding the safety, performance, efficacy, quality or comparative price of the product.[11]

Failure to provide substantiation, or the provision of inadequate substantiation is considered a violation. This was the Commission's first attempt to provide a pre-facto solution to the problem. Their resolution was further developed a year later in the Charles Pfizer & Co. case when the Commission promulgated the reasonable basis standard as a test of substantiation. The court found that since there were no controlled scientific studies testing the validity of product claims (in this case, the aerosol anesthetic, UNBURN) the manufacturers should bear the economic risk that the product might not perform as advertised, in the absence of prior reasonable basis.[12] Without relevant assurances, the court said, a consumer would be incapable of making a rational consumption decision.

There is some indication that the advertisement substantiation program may not achieve its goal. So far, two-thirds of the data submitted is either questionable or too technical to understand. The cold remedy companies sought a delay of one year, figuring that the Commission would not attempt to investigate year-old commercials.[13]

Another criticism has been that the public, for whom the program was designed, is ignoring the submitted reports. There has, however, been considerable interest expressed by journalists, academicians, and public interest groups.[14]

Psychological Advertising

The Commission has not, however, taken any definitive steps against advertisements which play upon our psyches. Yet there may be some evidence that the FTC is beginning to recognize advertisements in this latter category as being potentially deceptive.[15]

While little research has been done to determine the effects of such advertising, recent research by Richard Harris of Kansas State University confirms that people do not discriminate between what is directly stated and what is implied. He gives several examples of ways in which consumers are misled by linguistic manipulation:

> The use of hedge words that weaken the statement, such as "knock-out capsules may relieve tension."
>
> Using comparison adjectives that give no comparison, such as "Chore gives you whiter wash." The statement is undeniably true because it could be completed with any phrase, such as, "than washing with coal dust."
>
> Inadequate or incomplete reporting of survey or test results.
>
> Using a negative question, which implies an affirmative answer: "Isn't quality the most important thing to consider in buying aspirin?" The answer might very well be no, but the assumption is yes.
>
> The use of expressions such as "hospital-tested" or "doctor-tested" that give little information but lend an air of scientific respectability.[16]

It should be noted in reference to this study that the FTC, which regulates advertising on radio and television, has not defined a clear legal status for implied claims. "What constitutes deceptive advertising is complex, and though the intent to deceive is clearly prohibited, it is difficult to substantiate."[17]

The Federal Communication Commission

The area of false, misleading and deceptive advertising and its regulation has provided a profound challenge to both the Federal Communication Commission and the Federal Trade Commission. These two agencies have established a working liaison to handle abuses of advertising, but the precise lines of authority and responsibility have not been fully clarified.[18]

It is generally the policy of the FCC to: (1) avoid content review of alleged deceptive advertising; (2) to refer all complaints on the subject to the FTC;[19] and (3) to act only in clear, flagrant cases, Consumers Association of District of Columbia v. CBS and WTOP-TV, 32 FCC 2d 405 (1971).

However, the broadcaster does have a continuing obligation to "take reasonable steps to satisfy himself as to the reliability and reputation of prospective advertisers", Neckritz and Ordower v. KGO-TV, KRON-TV, KPIX, KNBC, and KNXT.

Where the licensee is unfamiliar with the advertiser or his product, he may either contact the local Better Business Bureau or other similar organizations, or he may request a statement or documentation of product claims from the advertising agency's counsel.

National Association of Broadcaster's Codes

Since 1937 commercial broadcasters have voluntarily devised general standards of practice for evaluating programming and advertising content. To that end the effort toward self-regulation has become increasingly sophisticated as the issues confronting broadcasters have become more complex. The industry is now served by the NAB Radio Code and Television Code.[20]

One function of the Code Authority is to assist subscribing stations in the review of commercials for Code compliance. Action results from inquiry or complaint of station managers, advertisers, advertising agencies or the public. In addition, a few categories of advertising, including children's toy commercials, are subject to a Code "pre-clearance". The Code has a built-in appeal process whereby staff rulings may be reviewed, upon request, by the appropriate Code Board committees and, ultimately, by the Code Boards themselves.[21]

In light of the wide range of laws, rules and regulations enforced by the FTC and the FCC, as well as the code of ethics which is guided by the National Association of Broadcasters, it is difficult to see what more could reasonably be done to further control false and deceptive advertising.

Puffery in advertising and selling has been highly criticized,[22] yet it is difficult to distinguish between puffery and deceptive advertising. One of the best known critics of puffery in advertising and selling, Ivan L. Preston of The University of Wisconsin--Madison, himself refers to this form of advertising and selling as "the purest baloney",[23] an offense hardly worth curtailing.

It seems that the worst that might come from such forms of advertising and selling would be the purchase of needless products and/or services, yet the harm of such results in the foreseeable future has not been established. A critical shortage of energy or natural resources might be a sufficient basis for further regulating advertising, yet such additional regulation would be obscured into oblivion by the social and economic controls that would have to be implemented under such circumstances.

In the meantime the FCC will continue deferring most cases of false and deceptive advertising to the FTC: "We therefore normally have not made, and do not intend to make, judgments whether particular broadcast advertisements are false and misleading. While we may indeed act in a clear, flagrant case, we shall continue our practice of generally deferring on these matters to the FTC," Consumers Association of DC v. CBS and WTOP-TV, 32 FCC 2d 400, 405 (1971).

Footnotes

[1]Gerald J. Thain, "Pref ce," Ivan L. Preston, The Great American Blow-Up (Madison: The University of Wisconsin Press, 1975), xii.

[2]15 US Code 45, Sect 5 (a) 1 (1970).

[3]Davis, "False Advertising and The Federal Trade Commission," 25 Baylor LR 650-659 (1973).

[4]"Guides Against Deceptive Pricing," (Washington, DC: The Federal Trade Commission, 1964).

[5]William D. Smith, New York Times (September 7, 1976), p. 52.

[6]Legal Guide to FCC Broadcast Regulations and Policies (Washington, DC: National Association of Broadcasters, 1977), p. IV-1.

[7]Gerald Thain, "Advertising Regulation and the Contemporary FTC Approach," Fordham Urban LJ (Spring 1973), p. 353.

[8]Thain, Op. Cit., p. 352.

[9]Rex Davis, "False Advertising: The Expanding Presence of the FTC," 25 Baylor LR 650-659 (1973).

[10]Ibid.

[11]Willard F. Meueller, "Advertising, Monopoly and the FTC's Breakfast Cereal Case: An Attack on Advertising?" 6 Antitrust Law and Economics Law Review 73-82 (1973).

[12]"The Pfizer Reasonable Basis Test-A Fast Relief for Consumers but a Headache for Advertisers," Duke LJ (1973), p. 563.

[13]Ibid.

[14]Ibid.

[15]"Psychological Advertising: A New Area of FTC Regulation," Wisconsin LR (1972), p. 1097.

[16]Sherida Bush, "The Art of Implying More Than You Say," 10 Psychology Today 36 (1977).

[17]Ibid, p. 90.

[18]Legal Guide to FCC Broadcast Regulations and Policies, ibid.

[19]Ibid.

[20]Ibid, p. IV-2.

[21]Ibid.

[22]Preston, The Great American Blow-Up, op. cit.

[23]Ibid, p. 3.